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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, et al.

Plaintiffs,

Civil Action No.
1:21-cv-11558-LTS

v.

AMERICAN AIRLINES GROUP, INC.,
et al.,

Defendants.

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

SCHEDULING CONFERENCE
Via Videoconference

Monday, November 29, 2021
2:06 p.m.

John J. Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
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PROCEEDINGS

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is November 29th, the case of United States of America et al., vs. American Airlines Group and JetBlue Airways Corporation, civil action 21-11558, will now appear before this Court.

Counsel, please identify themselves for the record.

(Discussion off the record.)

THE COURT: Go ahead, counsel, first for the plaintiffs.

MR. JONES: Good afternoon, Your Honor, I'm Bill Jones, with the Department of Justice on behalf of the United States. I have with me Ms. Kate Riggs and Mr. Jack Congdon, along with Mr. Grant Bermann.

THE COURT: Good afternoon.

And for the other plaintiffs?

MR. BERNHEIM: Good morning, Your Honor, this is Robert Bernheim from the Arizona Attorney General's Office, on behalf of the State of Arizona.

THE COURT: Good afternoon.

MR. MCNARY: Good afternoon, Rob McNary for California.

1 THE COURT: Good afternoon.

2 MS. MILLER: Good afternoon, Your Honor, this is
3 Jamie Miller from the California Attorney General's Office
4 for California, as well.

5 MR. DURST: Good afternoon, Your Honor, Arthur
6 Durst for the District of Columbia.

7 THE COURT: Good afternoon.

8 MR. FRASER: Good afternoon, Your Honor, Colin
9 Fraser for the State of Florida.

10 | THE COURT: Good afternoon.

11 MR. MATLACK: Good afternoon, Your Honor, Will
12 Matlack for the Commonwealth of Massachusetts.

13 THE COURT: Good afternoon.

14 MR. LEFF: Good afternoon, Your Honor, Daniel Leff,
15 also for the Commonwealth of Massachusetts.

16 THE COURT: All right. I think that's everybody
17 for the plaintiffs, right?

18 MS. BRADY: I'm sorry, Your Honor, I couldn't
19 unmute myself quick enough. This is Liz Brady, and I'm also
20 with the State of Florida.

21 THE COURT: Oh. Good afternoon. No problem.

22 MS. THOMSON: And Your Honor, this is Jennifer
23 Thomson for the Commonwealth of Pennsylvania. And we're also
24 joined by Joseph Betsko.

25 | THE COURT: Okay. Welcome.

1 MS. OXENHAM ALLEN: And also Sarah Oxenham Allen
2 for the Commonwealth of Virginia.

3 MS. BRACKETT: And good afternoon, Your Honor.
4 This is Rachel -- this is Rachel Brackett, also with the
5 Florida's Attorney General's Office.

6 THE COURT: All right. And then for -- maybe make
7 it simpler, for American Airlines, who's here?

8 MR. WALL: Good afternoon, Your Honor, this is Dan
9 Wall -- excuse me -- I'm joined by David Tolley, Maggie
10 Sullivan, Ian Conner, Allyson Maltas, and Farrell Malone.

11 THE COURT: Okay. Thank you. Welcome. Good
12 afternoon.

13 And then for JetBlue?

14 MR. SCHWED: Good afternoon, Your Honor, Richard
15 Schwed and joined by Matthew Craner, Jessica Delbaum from my
16 firm, and also Glenn MacKinlay from McCarter & English.

17 THE COURT: Okay. Good afternoon. I think
18 that's -- well, just a reminder to everybody who's on this
19 Zoom that although this is a Zoom proceeding, it's governed
20 by all the rules of the federal court and the laws governing
21 federal proceedings as if we were in person, which means that
22 there's no still photography, no audio recording, no video
23 recording, no audio/video recording, no rebroadcasting, no
24 streaming. Other than that, you can -- okay.

25 So I have the -- the joint statement from all of

1 you, and most of which -- or much of which is agreed to. So
2 I'll enter today, for sure, an order allowing all of that
3 which you agreed to. I've reviewed all of that and that all
4 seems reasonable and sensible.

5 I have two questions for all of you, really. One
6 is just to talk a little bit about the trial date, and second
7 is, with respect to the items about which you disagree. And
8 I think the simplest way to hear those is I've read all the
9 papers. I'm happy to hear first the Government, because they
10 are the plaintiffs, just -- we're not going to do one by one,
11 but just tell me -- you can go through and tell me why I
12 should take your position. If I have any questions, I'll ask
13 you. And then for the defendants, why I should take your
14 view on those issues.

15 But first, to circle back on the trial date, so
16 what I'm -- let me tell you what I'm understanding from what
17 you've given me. What I'm understanding is you have agreed,
18 not fully, but substantially on a schedule for this, that
19 culminates in a trial beginning in, your hope, September 26,
20 2022. And this would be, my understanding, is a bench trial.
21 You're anticipating about three weeks, and then post-trial
22 filings, and then thereafter I'll render a written decision
23 and judgment. And what you'd like to do is have me lock in
24 the time now as to the start of the trial.

25 Is that fair?

1 MR. WALL: That's correct, Your Honor.

2 MR. JONES: Your Honor, Bill Jones. Yes, that is
3 correct.

4 THE COURT: So this is what -- that makes sense to
5 me, to block out the time. I will do that. I think I want
6 to look back at the calendar. It will be some time between
7 the date -- it won't be earlier than September 26th, because
8 I understand the consequences to the schedule if I do that.
9 It will be somewhere between September 26th and not much
10 later than that. And I'll take care of that no later than
11 tomorrow, if not today, with one issue, the case management
12 order. I just want to check a couple of dates.

13 And are you thinking for a trial schedule, what
14 sort of schedule each day are you thinking?

15 MR. JONES: Your Honor, Bill Jones for the United
16 States. We -- we are amenable to whatever works for Your
17 Honor. We have not discussed that with the defendants.

18 THE COURT: Well, it came up on three weeks, all of
19 you. Did you think three weeks was 9:00 to 1:00 or 9:00 to
20 4:00 or 9:00 to 5:00?

21 MR. JONES: Your Honor, my apologies, sorry.

22 THE COURT: No, no. No apologies needed. Go
23 ahead.

24 MR. JONES: From our standpoint, Your Honor, we
25 would anticipate full trial days, if that is available with

1 Your Honor's calendar.

2 THE COURT: Okay. And that's what you were
3 thinking about when you said three weeks. You were imagining
4 that kind of schedule.

5 MR. WALL: Your Honor, this is Dan Wall for
6 American. I mean, to be candid, I think we were hoping that
7 you might give us substantially that amount of time, not
8 necessarily all that amount of time. We realize that's
9 asking for a lot. But this is certainly a case that is
10 likely to require something on the order of ten to 12 full
11 trial days of time.

12 THE COURT: Okay.

13 MR. WALL: Now, whether that's spread out in some
14 other way, shorter days, fewer days a week, that's what it
15 feels like it's going to take.

16 THE COURT: All right. Then what we'll do is this.
17 I'll block out the time. I'll give you a start date around
18 September 26th. I just want to look back at the calendar.
19 Those are helpful questions. In a bench trial, I'm fine to
20 go, for me, all day, subject to other matters. So I think
21 you should assume that it's unlikely we'll go 9:00 -- we'll
22 go full days every single day from the day we start to the
23 day we end, because that would pretty much preclude the
24 possibility for me to have any other proceedings in any other
25 case. On the other hand, you should assume we'll be doing

1 substantially that, and I'll see -- I think that for -- given
2 the nature of the case and what I imagine a lot of the
3 witnesses -- some of the witnesses are better done, to the
4 extent that some of them will spill over maybe more than a
5 day. But the more we can get done in blocks is better, I
6 think, for all of you, and certainly for me, and we can work
7 that out as we get a little further along.

8 Okay. So then with respect to the -- the issues
9 about which you disagree -- let me just see. I'm happy to
10 hear you briefly. I don't have a -- a lot of questions. But
11 I'm happy to -- and I will say this: If you say nothing,
12 you've waived nothing. You're only going to waive something
13 if you use the following phrase, "I waive"; then what
14 follows, you've waived. Okay. But if you just say, "Judge,
15 we're happy to rest on the papers," no problem, you won't
16 waive anything. You've all made your arguments. I hear it.
17 But I'm happy to hear you if there's anything that you want
18 to add to whatever is set forth in the joint statement as to
19 the issues about which you disagree.

20 And I'll hear first from you, Mr. Jones, because
21 it's your case.

22 MR. JONES: I thank you, Your Honor. And let me
23 say, first, that we have worked really hard with the
24 defendants to reach an agreement on a large number of
25 matters, as you can tell from the joint proposed order that

1 we submitted. But those areas of dispute that remain live
2 disputes, from our standpoint, are substantial disagreements,
3 and in this regard, Your Honor, they seem to have a common
4 throughput theme here of defendants seeking to limit our
5 ability to take discovery while really preserving for
6 themselves the possibility of doing things like adding
7 witnesses at a time that we would not have an opportunity to
8 conduct discovery or being able to add unlimited documents to
9 an exhibit list late in the day. Your Honor, those are
10 important issues for us in terms of preserving our ability to
11 adequately put on our case for Your Honor.

12 And also, a significant issue, as well, is the
13 notion of limiting our depositions of those executives who
14 have already been deposed to some amount of time shorter than
15 that allowed by Rule 30. And we think, as any other
16 litigant, the plaintiffs here should be able to have all of
17 the discovery rights and responsibilities of any other
18 litigant, despite the -- despite the fact that we did a
19 precomplaint investigation to ensure that -- that we were
20 making an informed decision to bring this action.

21 Other than that, Your Honor, I would ask that --
22 that our papers speak for us on this. We think that so long
23 as we're able to have adequate discovery of late breaking
24 witnesses and late breaking documents, that's what we are
25 seeking to achieve in our positions and the joint papers.

THE COURT: Okay. Thank you.

For the defendants, or one by one?

MR. SCHWED: Thank you, Your Honor. Mr. Wall and I, I would say, divvied up the issues, so maybe I'll just start and kind of -- and talk generally about the ones I was prepared to talk about, and then Mr. Wall can carry forward.

On the issues of the number of depositions and the length of depositions for the executives and employees that have already been deposed, I think a common starting point for all of these disputes, in some sense, is we started with what's normally in a case management or what do the federal rules and the local rules provide, and then also had to layer in the fact that, unlike a lot of cases, we're not starting from an equal position as the Department of Justice.

They have been effectively conducting discovery for a year. They've issued -- had the power to and certainly did issue CIDs, get documents from third parties, depose third parties, get witness statements from third parties. We actually, the day after the complaint was filed, raised this issue with the Department of Justice and said it would be much easier to negotiate a case management order and figure out what needs to be done, and we could get started much more quickly if we had that file.

And their position -- and the rules don't require them to do otherwise, but their position was: We're not

1 going to give you that until after there's a case management
2 order.

3 So for the last two months, we've been in the dark
4 as to whether they've interviewed ten third parties or 50
5 third parties, whether they have witness statements, et
6 cetera. And so part of what is driving our positions is that
7 lack of knowledge.

8 And so on the number of depositions of the parties
9 themselves, the starting point -- the other starting point we
10 had is that the local rules and the federal rules say ten per
11 side.

12 Now, we recognize this is a case that doesn't need
13 ten per side. It needs more. But -- and we agreed with them
14 on 35. But the main driver of that number was the potential
15 for third party witnesses. And again, we don't know how many
16 there are, because we don't have the file. But we, of
17 course, needed to give us, ourselves, the ability to protect
18 ourselves from surprises with third parties.

19 There's no reason -- we had offered ten per
20 defendant, and then we had said, well, up to 12, with a
21 maximum of 12. The DOJ has not articulated or the plaintiffs
22 have not articulated any real reason they need more than
23 that, which is a lot more than the default rule. And they
24 have had plenty of time to know who our witnesses are, and we
25 think that is more than enough for them to get done what they

1 need to get done. And of course, if the order says a certain
2 number, and later on they have good cause, nothing prevents a
3 party from coming back and seeking more. But our view is
4 there should be a limit, and they shouldn't get to, in
5 essence, use the uncertainty about the number of third
6 parties we're going to need to create more of an opportunity
7 to depose our witnesses.

8 Turning to the length of depositions of those
9 witnesses who have already given testimony, there were 11
10 witnesses between the two defendants who gave testimony.
11 Most of the testimonies were -- most of the testimony took
12 place over a full day or the better part of a day. And there
13 were a number of senior executives, up to the CEO, about
14 three-and-a-half months ago, or three-and-a-half months
15 before the complaint was filed.

16 Why executives of the defendants? We understand
17 they have the right or want the right to talk about things
18 that have happened since then. They want the ability to ask,
19 maybe, things they didn't ask. But they don't need 14 hours
20 of testimony from employees and executives of the defendants.
21 They say there was a different purpose of those depositions,
22 but frankly, I don't think anybody on the plaintiffs' side
23 could, in good faith, say they asked a whole lot of questions
24 they wouldn't be asking -- or they'd ask a whole different
25 set of questions if they'd done it after the complaint was

1 filed rather than a few months before the complaint was
2 filed.

3 And the cases they cite, none of them have to do
4 with this issue. One, the case they mostly rely on, the
5 Court had tried to -- or the defendant has said the SEC
6 didn't get any discovery.

7 If I could just go out of order a little bit, just
8 so that way Mr. Wall and I don't go back and forth, I think
9 there's also a broad issue of what needs to be in this case
10 management order, such as the number of witnesses on a
11 witness list. That's not something that's ordinarily in a
12 case management order. That's not something that is easy to
13 do at this stage. Again, maybe the DOJ can do it, because
14 they've got a lot of discovery. But for us, to try to say
15 how many witnesses we're going to be able to identify today,
16 when we've had no discovery and we're ten months away from
17 trial, is not something that's in this case management order,
18 because it really doesn't make a lot of sense.

19 Obviously, we will negotiate that in good-faith at
20 the right time, but we don't believe that now is the right
21 time.

22 And with that, in an effort to keep it brief, I
23 will turn it over to Mr. Wall.

24 THE COURT: All right. Mr. Wall?

25 MR. WALL: Thank you.

1 Your Honor, the issues that I was going to talk
2 about really relate to what Mr. Jones said at the beginning,
3 where -- as I noted it down, they're concerned about that
4 we're seeking provisions that would limit their ability to
5 take discovery of late-breaking things and add witnesses
6 later on. And that has led them to this idea of this sort of
7 supplemental discovery period and also this related idea that
8 would be presumptively reasonable to schedule a deposition on
9 21 days' notice. And I just want to make it clear that the
10 way that we -- we look at it just entirely the opposite.

11 That, as Mr. Schwed said, the unusual thing about a
12 case like this is the Government has this head-start, which
13 is based not just on the time it has and the CID powers, but
14 the fact that it's the Government allows it to go after the
15 third parties and say, "We want to talk to you about this
16 deal. We want to hear about this." They have a huge
17 head-start in the identification of witnesses, and the
18 defendants play catch-up. And I'm not complaining about it;
19 it's just the reality of it. They -- it's asymmetric for the
20 preinvestigation period. Those are the rules, and we play
21 catch-up. So be it.

22 As a result of that, there's just a lot of things
23 that we're not, sort of, ready to commit to for a long time,
24 because we're playing catch-up. And instead, they're making
25 an argument that they're facing the potential for prejudice

1 by being the ones that learn about things late; and from
2 that, there's this idea of actually building into the
3 schedule something which is entirely novel. It's not in any
4 of the templates -- they cite a lot of templates from their
5 other cases, Your Honor. It's not in any of them to have
6 this supplemental discovery period, where it -- it's based
7 upon the idea that there's two rounds of initial -- of
8 witness disclosure. And if somebody is on the second list
9 but not the first one, then you get this problematic period
10 of time to take discovery of them.

11 And all we said in response to that is we have got
12 background rules that we apply in every lawsuit, about what
13 happens if there is unfair surprise at some point in time.
14 And we don't need to anticipate that, in this case, those
15 rules will be inadequate. And then simply write in a
16 provision that sort of automatically says that, if a name is
17 only on the second list, that there is both document and
18 deposition discovery, particularly when, if you look at the
19 calendar that we've created, that would occur in July, most
20 likely, which is, along with August, are the two most packed
21 months in this entire schedule.

22 And so our view is that -- a little bit of that
23 fear about Parkinson's law coming into this, and work will
24 expand the time that is permitted for this it. And if we put
25 this thing in place, which is not necessary and is not

1 normal, then it's going to affect how people make disclosures
2 and it's going to end up creating -- you can just take it to
3 the bank that we will have a bunch of this discovery, when it
4 ought to be rare. There's nothing about that that's
5 gamesmanship or trying to hem them in. They've got every
6 opportunity over the next six months, on top of --

7 THE COURT: Here's the question, though, Mr. Wall,
8 with respect to that, that I'm thinking about. It's this.

9 MR. WALL: Yeah.

10 THE COURT: It's true that the standard form case
11 management order doesn't include that. Mine, for example, as
12 you all pointed out, or any others of which I'm aware -- of
13 course, standard form is also not to -- this is essentially
14 the Rule 16 conference, or this is the Rule 16 conference, to
15 schedule, at least in most districts, a definite trial in
16 which there are no other cases on for trial at that time.
17 Because that's what I'm going to do. I'm going to schedule
18 this for trial. And I know one of you commented that it was
19 a long discovery period. But I don't really think that this
20 was a long --

21 I mean, I will tell you that typically I think six
22 months for fact discovery, in a garden variety case. This
23 case is not, in its complexity or scope, garden variety in
24 its size, as for no other reason witnessed by the number of
25 lawyers on the plaintiffs' side or the defendants' side.

1 This is not a diversity auto accident case in which there's
2 two drivers and one witness and maybe two reconstruction
3 excerpts talking about what happened in the course of four
4 minutes, if that. And so -- and I understand why.

5 First of all, I commend all of you for agreeing to
6 all of the things that you did, because I think that
7 that's -- you'll be happier with what you agree with, than
8 laying it all before me and having me just dictate all of
9 these things, when you're much more familiar with the case.
10 And I think that -- so I commend all of you for that.

11 And no problem that you didn't agree on everything.
12 I understand how that works out.

13 But with this -- but it's my experience that, in
14 lots of cases, what happens at the end, people disclose
15 witnesses at the end, and there is this sort of -- the rules
16 don't particularly address it, and in a small case, where
17 there's a lot more time often between each stage, they're
18 more easily addressed. But sort of the point that someone --
19 you can add someone late in the game, but then the other side
20 gets to have a deposition, sort of resolves some of that. It
21 seems like a sort of reasonable resolution of it.

22 I understand that it, to some degree, front loads
23 back. Typically witness lists will be filed closer to trial
24 than these dates you're talking about. But on the other
25 hand, this whole process is compressed. So I'm wondering,

1 given the compression, given the sort of schedule that we're
2 adopting with like we're going on whatever date in September,
3 or thereabouts, that why it isn't sensible to, sort of, in
4 some way, fair -- it may be that that's -- the motivation
5 that you ascribe to the Government may be their reason. I'm
6 indifferent to that. I'm -- I'm not moved, necessarily, by
7 their motivation, reason, but it's practical that, like, both
8 of you might be in this situation. You could be in -- as you
9 point out, you're playing catch-up. You could be in the
10 situation wanting to take advantage of -- and it seems fair.
11 That's what I'm wondering about.

12 So I'm wondering -- it's a long -- I'm not sure
13 it's -- not an example of the kind of question you should ask
14 at trial, but why isn't it fair, in the circumstances, (a),
15 to sort of push back the witness list, and (b), then to give
16 people the chance to take a deposition of someone who they
17 didn't know about?

18 MR. WALL: Well, I think that you're not going to
19 get an argument from us that people shouldn't be able to take
20 a deposition of someone they didn't know about, but that's
21 precisely the point. The point that we made to the
22 Government is, look, this is one thing if it is a person --
23 like, for example, in a case like this, witnesses are going
24 to come from different constituencies, like competitors
25 versus customers. The competitor constituency is a small,

1 identifiable constituency, and nobody should be shocked if
2 either one of us puts a senior sales or strategy person from
3 another airline, you know, on a witness list, because those
4 people are in play right now. We all know it today. Before
5 we get initial disclosures, we know that those people are in
6 play.

7 On the other hand, if that's -- if it is like an
8 individual consumer that's going to testify, or something
9 like that, there's no way we would be able to figure that
10 out. So people are not in a --

11 THE COURT: But it's sort of the same, both those
12 groups, really. Right? Like you all know individual
13 consumers are in play, but you don't know which ones, right,
14 and there's too many to possibly figure it out. And you all
15 know these sales marketing people are all in play. But even
16 with the relatively -- I'm assuming what we're really talking
17 about is the four -- what they denominate as the four major
18 carriers, plus there's like six or eight others that they
19 list, sort of, that have the vast majority of the market
20 share, then you're talking about senior marketing or strategy
21 people from these companies.

22 But there's still a fair number of people at those
23 companies. People come and people go. There are people who
24 are in the industry; they went to a consulting firm; they
25 went somewhere else. Like you might -- you know all of those

1 people who are in play, but you don't know, like -- and even
2 if you knew that X was, like, in the zone, if you haven't
3 talked to X, you might want to talk to X before the trial,
4 and like what's the problem?

5 MR. WALL: Well, I mean, one of the problems is
6 we're just going to have to work on the schedule a bit more
7 to make this time happen. Because if that's the case, it is
8 actually calling for earlier disclosure of witnesses, not
9 later, right?

10 THE COURT: Right.

11 MR. WALL: Which --

12 THE COURT: As I understand it, so we're clear --
13 Maybe, Mr. Jones, correct me if I'm wrong, what
14 this is proposing is a bit earlier than otherwise would occur
15 disclosure of witnesses, the purpose being that both sides
16 get the chance, then, to be sure if they want to, they get to
17 take the deposition of people either in phase -- with list
18 one or list two.

19 MR. WALL: Well, but this supplemental discovery
20 only applies to people who were not on the first list and
21 were on the second list. Right? So --

22 THE COURT: Right. But the first list you have a
23 crack at during regular discovery out of your 35, if you
24 haven't blown through all of your 35 already, right?

25 MR. WALL: That is correct. Indeed. Right. And

1 in fact, we ought to have a crack at them from the time of
2 initial disclosures, because, you know, they should be
3 identifying these people very, very shortly, not just in a
4 witness list, trial witness list.

5 THE COURT: Sure. If it's conceivable -- in fact,
6 not only conceivable, but it's almost guaranteed -- well,
7 you're saying the only people they're disclosing are the
8 people upon whom they're relying, not just people with
9 knowledge.

10 MR. WALL: Right. And so this is the thing that
11 maybe I'm losing the thread on, Your Honor, but they ought to
12 have a pretty good idea today who, during the yearlong
13 investigatory process, gave them, you know, colloquially,
14 good stuff. And as a result of that is someone that should
15 at least be on an initial disclosure list. And we will
16 depose them right away when -- you know, we'll make
17 judgments, but we will get on that and not back load it. So
18 again, we're not trying to -- we're not trying to say that if
19 there's any kind of surprise, there shouldn't be a
20 deposition. We're going to want that right, too.

21 THE COURT: Right. I see.

22 So what you're really saying is, given the
23 precomplaint investigation, they should have a pretty good
24 idea of who their people are, and so their Rule 26
25 disclosures will be identifying that. Your Rule 26

1 disclosures about who you're relying on are likely to evolve,
2 because you're playing catch-up. And so, even though it's a
3 seemingly two-way thing --

4 MR. WALL: Right.

5 THE COURT: -- it imposes more difficulty on you.
6 Because in order to accomplish it, it requires an earlier
7 disclosure of witnesses than otherwise would occur.

8 MR. WALL: Right. And then just fundamentally,
9 that the identification of trial witnesses is not supposed to
10 be kind of a critical path item in discovery. It's supposed
11 to be -- you're culling down at that point. Right? That's
12 what we're supposed to be doing is culling down, not acting
13 as if that is when you're going to actually finally tell
14 people who you think the important third parties are.

15 THE COURT: Okay.

16 MR. WALL: Your Honor, I was going to discuss other
17 issues --

18 THE COURT: Sure.

19 MR. WALL: But in the interest of time, I'll just
20 go ahead and end there.

21 THE COURT: Okay. Mr. Jones, did you want to say
22 something?

23 MR. JONES: Your Honor?

24 THE COURT: Yeah, go ahead.

25 MR. JONES: Yes, sir, Your Honor. It seems like

1 part of the backdrop here of the dispute is, really, kind of
2 a fiction here about the Government's so-called head-start.

3 Your Honor, the defendants are the ones with --
4 with every day, nearly 24/7 access to their own executives,
5 their own employees, the people who negotiated the deals that
6 are at the heart of this case, the people who are
7 implementing these deals as we speak. They have access to
8 those, ready access. They have ready access to their own
9 documents. So Your Honor, those will be critical items in
10 the case that they, of course, as they should, it's their
11 clients, to have ready access to. But beyond that, Your
12 Honor, in thinking about third parties, particularly third
13 parties that fall in the category of customers, such as
14 business customers, corporate customers, they also have
15 business relationships with that category of folks where they
16 are aware of who they compete for and who they have competed
17 for, and they have relationships with those folks.

18 So Your Honor, this notion that the Government is
19 really ahead really just ignores a fundamental fact that
20 counsel for the defendants are working closely, I presume,
21 with their clients, who are in this industry every day;
22 whereas, on the plaintiffs' side, we're -- you know, we're
23 lawyers for the United States and for the plaintiff states,
24 we work on this industry now, we work on other things, but
25 we're not kind of in the day-to-day competitive scrum of

1 their industry with their employees. So Your Honor, that's a
2 bit of a misnomer that I wanted to correct.

3 THE COURT: Okay. Thank you.

4 I'm going to think about this, but I'll resolve the
5 case management order issues -- I'm going to adopt the case
6 management order as to everything you agreed upon. I'll
7 issue it shortly, once I resolve these couple other issues.
8 I want to think about what you said, all of you, and look
9 back at the disputed issues. And I'll establish the trial
10 date on or about the date you propose.

11 Just a couple other quick questions.

12 For proceedings like this, I mean, there's a lot of
13 you, and none of you are here in Boston. That was a
14 reflection of your own choices, and I can't account for that.
15 But it's generally, now -- "now" being the last couple
16 months -- been my practice for things, proceedings like
17 status conference and Rule 16s, to ordinarily do them by
18 Zoom, because Zoom is more than sufficient for that and it's
19 such an efficiency tool, but for motion hearings to typically
20 do those in person.

21 I am bringing this up because there's a lot of you,
22 and I understand that to have something in person just
23 requires a tremendous expense for everybody. So I guess my
24 question for all of you is, if, for example, I have a hearing
25 on the motion to dismiss, once it's ripe, is there any reason

1 I shouldn't do it in person? I'm not offended -- I've done a
2 lot of them during COVID not in person, but I'm wondering if
3 you have views about that? Because if you don't, I'm telling
4 you about -- that's my general practice. So what you would
5 expect, a status conference to be done by Zoom.

6 I'm happy to do any of them in person. I'm here.
7 We're doing trials. We're doing plenty of proceedings in
8 person. I'm doing this by Zoom not because of COVID, but
9 because it just seems more efficient and practical.

10 So if you have a view about motion hearings -- the
11 final pretrial conference would probably be in person.
12 Obviously, I'm anticipating that the trial would be in
13 person. But if you have general views about that and you
14 want to express them, you can express now or you can express
15 them another time. But that's what I'm going to do, unless
16 somebody objects or suggests otherwise. I'm happy to hear
17 the suggestion or objection.

18 MR. WALL: I strongly agree with that. I
19 definitely would like to do motion to dismiss hearings,
20 anything substantive in person. And the travel is no issue.

21 THE COURT: Okay. All right.

22 MR. JONES: Your Honor, we're amenable to that, as
23 well, on behalf of the United States.

24 THE COURT: Okay. Fine.

25 MR. SCHWED: And for JetBlue, as well, we're

1 comfortable with what Your Honor proposes, with what tends to
2 be normal practice.

3 MS. OXENHAM ALLEN: Your Honor, this is Sarah Allen
4 from Virginia.

5 THE COURT: Hold on. Let me just -- oh, there you
6 are. Okay. Go ahead.

7 MS. OXENHAM ALLEN: I'm sorry, my camera doesn't
8 seem to be working.

9 THE COURT: No problem.

10 MS. OXENHAM ALLEN: But anyway, I was wondering if,
11 since there are so many plaintiffs, would it be possible to
12 have in-person hearings, but also on Zoom?

13 THE COURT: Yes. So for example, if the motion to
14 dismiss is being argued by Mr. Jones, just say, for example,
15 and the state AG plaintiff counsels are not planning -- not
16 planning on making oral argument at the hearing, yes, it's
17 totally fine. And so we can work out a hybrid where you
18 could Zoom into the courtroom, and the other people would be
19 in court. And that would be fine.

20 And you could -- when I schedule it, if I schedule
21 it in person for a hearing, substantive hearing like that,
22 and you want to come and you're either not planning on making
23 argument because you're relying on the Government, the
24 federal Government's argument, or it's a very tiny, niche
25 issue, maybe one small nuance related to something about

1 Virginia law, for example, or Virginia, then you could just
2 work that out with the clerk to appear by Zoom.

3 MS. OXENHAM ALLEN: Okay. Thank you, Your Honor.

4 THE COURT: No problem.

5 All right. Any other -- is there anything else
6 related to that?

7 Are there any other matters anybody else wants to
8 bring up that aren't ones that I brought up?

9 MR. JONES: None for the United States, Your Honor.

10 THE COURT: Okay.

11 MR. WALL: No, Your Honor.

12 MR. SCHWED: Nothing for JetBlue, Your Honor.

13 THE COURT: You might want to think about this --
14 and I'm not going to schedule this now, but given that we
15 have this tightly integrated schedule, whatever I resolve
16 about the disputed issues, it might make sense to check in
17 along the way with some status conferences to be sure we're
18 on track. And so I won't schedule one now, because
19 there's -- at least we'll see what happens on the motion to
20 dismiss, and we'll sort of have a hearing or what it looks
21 like after I see the response. And so you can -- you should
22 feel free, if you think it would be helpful, at any point, to
23 just ask for it, and I'll schedule it. That's not a problem.

24 The other thing that I'll just tell you, what I'm
25 about to tell you I'm imagining might be hypothetical, but

1 just in case it's not. Sometimes parties in civil cases have
2 discovery disputes, and so I will tell all of you, I'm
3 perfectly content, if you can't -- if you're unable to work
4 it out, you can file a motion to compel or a motion for
5 protective order and an opposition and a reply, and I'll
6 address it and that's fine.

7 But one thing that I do in many cases -- I don't
8 require it, necessarily, and to some extent I rely on the
9 judgment of the lawyers as to whether this alternative
10 procedure for the particular issue makes more sense or not,
11 but what I find sometimes presents the issue faster, which,
12 in a case like this matters, I think, and often more than --
13 less expensively, is if you do a -- prepare and submit a
14 joint status report. And I'll give you an example.

15 Suppose there's an interrogatory from -- it doesn't
16 matter which side, one side, and you're unhappy with the
17 answer. So you give me -- you know, the joint status report
18 says, "Well, plaintiff served this interrogatory, and here's
19 the answer. And here's the supplemental answer after the
20 meet and confer. And here's plaintiffs' explanation," kind
21 of like you did in the -- about the issues you couldn't agree
22 upon in the case management order. Here's plaintiffs'
23 position as to why a more fulsome answer is required, and
24 here's defendants' explanation of why not. And it could be
25 one interrogatory, or it could be ten. And I find that tends

1 to be faster than the motion -- two week response, week
2 reply, plus it's just all laid out there and each --

3 That's how I'm going to resolve the issues. I'm
4 just going to put your papers together and resolve them that
5 way. And you can group -- if there's three interrogatories
6 or three requests for production that turn on one --
7 essentially you win them all or you lose them all, probably.
8 Maybe there's some nuances a little bit, and you can present
9 those, but they make sense to be grouped together and thought
10 about together, you can present them altogether that way.

11 And so I'm not -- I don't require it. It's a
12 practice that I often follow and suggest to people, because I
13 do think it saves time and money. You'll get a faster,
14 better result from the Court. So you might want to think
15 about that. If -- I say it's a little bit hypothetical,
16 because you might be able to work everything out. But if you
17 can't, okay.

18 I don't think I have anything else.

19 Anything else for the Government?

20 MR. JONES: No, Your Honor. Thank you.

21 THE COURT: All right. Anything else for you,
22 Mr. Wall?

23 MR. WALL: No, Your Honor. Thank you very much for
24 making the time for us today.

25 THE COURT: Is it -- am I saying it right if I say

1 Mr. Schwed?

2 MR. SCHWED: Yes, that's good. Thank you, Your
3 Honor. Nothing here, Your Honor.

4 THE COURT: Good enough, or correct?

5 MR. SCHWED: I say Schwed, but I am not very
6 particular.

7 THE COURT: Okay. Well, I would rather be right
8 than close enough.

9 All right. Thank you very much.

10 MR. SCHWED: Thank you, Your Honor.

11 THE COURT: All right. We're adjourned.

12 (Court in recess at 2:47 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

4 I, Rachel M. Lopez, Certified Realtime Reporter, in
5 and for the United States District Court for the District of
6 Massachusetts, do hereby certify that pursuant to Section
7 753, Title 28, United States Code, the foregoing pages
8 are a true and correct transcript of the stenographically
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10 that the transcript page format is in conformance with the
11 regulations of the Judicial Conference of the United States.

Dated this 24th day of January, 2022.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter